

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

HUFFMAN AND WRIGHT LOGGING CO.¹

and

Case 36-CA-9037

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 701

Sarah A. Volpone, Esq., of Portland, Oregon
for the General Counsel

James O'Connor, Esq., of Gladstone, Oregon for
the Charging Party

Craig R. Armstrong, Esq., Miller Nash LLP,
of Portland, Oregon for the Respondent

DECISION

Statement of the Case

Mary Miller Cracraft, Administrative Law Judge. General Counsel alleges that Huffman and Wright Logging Co. (Respondent) committed unfair labor practices on May 16, 2002² by telling its employee Larry Lovelady (Lovelady) that he would not have been hired if Respondent had known he was an organizer for International Union of Operating Engineers, Local No. 701 (the Union) and that Respondent would lay him off and put a non-Union replacement on the job because there was "no way Respondent would go Union." These statements are alleged to violate Section 8(a)(1) of the Act.³ The subsequent discharge of Lovelady on May 16 is alleged to violate Section 8(a)(1) and (3) of the Act.⁴ It is further alleged that on May 20 Respondent threatened an applicant in violation of Section 8(a)(1) by telling him that Lovelady was laid off because he was a Union organizer.⁵

¹ This name appears as corrected at the hearing.

² All dates are in 2002 unless otherwise referenced.

³ Section 8(a)(1) of the NLRA, 29 U.S.C. §158(a)(1), prohibits employers from interfering with, restraining, or coercing employees in the exercise of their right to self-organization under section 7 of the Act, 29 U.S.C. §157.

⁴ Section 8(a)(3) of the Act provides that it shall be an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization." 29 U.S.C. §158(a)(3).

⁵ The Union filed the unfair labor practice charge in this case on June 11. Complaint issued on September 25. Trial in Portland, Oregon was on November 7.

On the entire record, including my observation of the demeanor of the witnesses,⁶ and after considering the briefs filed by the General Counsel and Respondent, I make the following

5 Findings of Fact

I. Jurisdiction and Labor Organization Status

Respondent, a State of Oregon corporation, is engaged in the highway and heavy
10 construction business from its facility in Canyonville, Oregon, where, during the past fiscal year, Respondent purchased and caused to be transferred and delivered to its facilities within the State of Oregon, goods and materials valued in excess of \$50,000 directly from sources outside the State of Oregon. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor
15 organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Background

20 Respondent's highway and heavy construction business involves earth moving and concrete construction. For example, Respondent constructs bridges, storm drains, water and sewer pipes, and water treatment and wastewater treatment plants. It employs about 100 construction workers on multiple projects. Mike Moore is the general manager of the
25 construction group. Respondent does not have a contract with the Union.

Moore generally staffs each construction project with a project manager or
superintendent as well as a project engineer. Depending on the size of the project, he also
30 assigns a roadway foreman and a structure foreman. Finally, key or core group craftsmen for earth moving, structural or underground work are assigned to the project, as needed. Generally, these key or core group craftsmen, also called senior employees by Respondent, are utilized as close to 100% of the time as possible.

During the spring and summer, Respondent operated the following projects: (1) Vilas
35 Road, Medford, Oregon, for the Oregon Department of Transportation (ODOT), completed in late May or early June; (2) City of Glendale, Oregon water treatment plant completed at or around November; (3) Interstate highway 5, Garden Valley, Roberts Creek section, completed the first week of November; (4) City of Albany, Oregon, Maple Street Pump Station, completed the second week of November; (4) Interstate highway 205, Sunnybrook, Oregon for ODOT,
40 terminated in late March; (5) Cannon Beach Oregon north entrance project for ODOT, ongoing at the time of trial; (6) Booth Bridge rail retrofit for ODOT. Respondent performed excavation work at all of these projects.

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⁶ Credibility resolutions have been made based upon the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

Lovelady has been employed by the Union as an organizer since mid-February. For 22 years prior to becoming an organizer, he was a heavy equipment operator. Lovelady first began work for Respondent on or about March 18 at the Sunnybrook site as an excavator for the ramp A "keyway," an area of unsuitable soil which had to be excavated and filled with rock in order to provide a stable grade for ramp A. All employees were laid off on or about March 26 due to lack of work when Respondent was terminated at the Sunnybrook project by ODOT. Thereafter, according to Respondent, on May 7, Lovelady was offered work at Respondent's Maple Street Pump Station in Albany, Oregon. He declined this work. Lovelady disagreed, testifying that he called Albany many times and went to Albany to get work and was told there was no work.⁷

In any event, Respondent had another ODOT project, the Cannon Beach north entry project, constructing a new interchange to California highway 101. The project encompassed an exit ramp at the north entrance to Cannon Beach to accommodate southbound traffic, as well as north- and south-bound entrance ramps. Incident to this construction, Respondent moved earth, constructed storm drain pipes and the concrete structure work, walls and bridge. This project was begun in April and was not complete at the time of this trial.

Mike Robertson is the job superintendent for this project. Robertson initially staffed one of the excavations with one track hoe operator, Steve Wilford. However, in excavating this sheer key in mid-May, it became necessary to dig 10 to 12 meters deep, rather than 3 to 6 as originally planned. This created a massive pile of dirt. Additionally, heavy rains increased the danger of allowing the dirt to pile up. Robertson and ODOT were particularly concerned about a mudslide onto Old Cannon Beach Road and the wetlands below the road.

Robertson immediately requested another track hoe operator from construction general manager Moore. Moore recalled that this conversation took place on Thursday, May 9. Moore did not have anyone he could send to Robertson immediately but had some senior operators becoming available soon. Robertson needed someone immediately. He suggested Lovelady because he thought Lovelady was immediately available and had already passed Respondent's drug test and could perform the necessary work. Moore approved this suggestion.

Robertson spoke to Lovelady and told him that he needed him for a week but there was a possibility it could be longer. Lovelady accepted Respondent's job offer at the Cannon Beach project and began working there on May 13. Although Lovelady believed that the potential for mudslide occurred on May 14 when there was a heavy rain, he agreed that his work was to remove a mudslide.

Robertson testified that he knew Lovelady was a member of the Union because Lovelady told him so while on the Sunnybrook project. Robertson also knew from Wilford that he was a member of the Union. In addition, Robertson hired Darren Wilcoxon, a Union crane operator, for the Cannon Beach project and Mack McCleary, general foreman and Union member for the Cannon Beach project.

⁷ Failure to hire Lovelady at the Albany project is not alleged as a violation of the Act.

On Tuesday, May 14, Moore again spoke to Robertson about staffing at Cannon Beach. Moore informed Robertson that excavator operator Jeff Spears, a 22- or 23-year employee, would be available for Cannon Beach upon completion of his work at Vilas Road. Moore instructed Robertson to lay off Lovelady when he finished the earth moving in order to make room for Spears.

Moore testified that at the time he made the decision to lay off Lovelady from Cannon Beach, he had no knowledge of Lovelady's Union activity or sympathy. He simply selected Lovelady because Lovelady's portion of the earth moving would be completed on May 16.

Threat that Respondent would not have hired Lovelady if it had known he was a Union organizer; threat that Respondent would lay off Lovelady and put a non-Union person on the job to replace Lovelady because there was "no way Respondent would go Union"

Facts

According to Lovelady, on May 16, at about 11:30 p.m., he got off his hoe. Robertson was in the vicinity. Lovelady showed Robertson his organizer card. Robertson responded, "Why didn't you tell me this when you put your application in?" Lovelady responded, "If I'd done that, you wouldn't have hired me, would you, Mike?" Robertson responded, "No." Lovelady told Robertson he was going to take lunch. Then Lovelady went to the top of the project and stood with head Union organizer Anderson, picketing. Lovelady returned from lunch and took the hoe back from Robertson, who was operating it in his absence. Robertson asked Lovelady how he was going to organize and Lovelady responded that he was going to hand out authorization cards. Robertson opined that Fritz Peterson had worked for Respondent 30 years and would not sign a card. Lovelady responded that that would leave he and Wolford and the vote would be two to one. Robertson said, according to Lovelady, that he would lay off Lovelady and hire a non-Union operator. Lovelady could not remember any further conversation.

On May 16, according to Robertson, he observed Lovelady's hoe stop at noon. Robertson asked Lovelady if there was a problem. Lovelady said he was going to take lunch and go organize. Robertson protested that there was a critical situation and he really needed Lovelady to dig. Robertson asked what Lovelady meant by "organize." Lovelady showed Robertson a Union card with his name and title, "Union Organizer." Robertson responded, "Well, what are you going to organize? I have a five-man band here." Lovelady responded, "I'm going to make this project a union project." Robertson countered, "Well, knock yourself out. There's Cliff, a laborer, a salaried engineer, my foreman Jim Deardorff, and Fritz Peterson on the dozer, and Steve Wilford, who you know is a No. 701. Knock yourself out. See you after lunch." Robertson got on Lovelady's hoe and began running the machine.

About 25 to 30 minutes later, Lovelady returned. Robertson parked the machine and, according to Robertson, he asked Lovelady how it had gone. Lovelady responded that he had not actually talked with any employees. Robertson asked why Lovelady had not made prior arrangements to organize instead of deciding to organize in the middle of a dig on a critical job. Lovelady responded he did not think Respondent would have hired him if they knew he was an organizer and that he had not been organizing very long and if there were any questions, they should be addressed to head organizer Jim Anderson, who was picketing at the north end of the job. Robertson denied telling Lovelady that he would not have hired him if he had known he was a Union organizer. Robertson also denied telling Lovelady that he was going to replace him with a non-Union operator. Robertson noted that he already had Union operators on the job.

Although he did not recall this part of the conversation even when he read his affidavit at General Counsel's request, pursuant to Union counsel's leading questions, Lovelady recalled that Robertson also told him that Respondent would never go Union. According to Lovelady, Robertson also told Lovelady that there had been a prior attempt to organize the crane operators. Robertson denied making such statements. As to Lovelady's claim that Robertson said Respondent would never go Union, Robertson explained that he would not have made such a statement because, as he understood the law, such a decision was out of his hands.

According to Lovelady, Robertson stood on the hill and watched him for the remainder of the afternoon. Lovelady claimed he could monitor this while driving his hoe and performing his other duties. Further explication on cross-examination, revealed that Robertson was assisting Lovelady by guiding his work around a telephone junction box and a spruce tree that could not be damaged (but was) and that Robertson was handling other matters as well.

Argument

Recognizing that analysis of these allegations involves a direct credibility conflict between Lovelady and Robertson, the parties argue that their witness should be credited over the other party's witness. General Counsel asserts that Lovelady provided detailed, straightforward accounts of the evidence while Robertson's testimony should be discredited because his position with Respondent provides no motivation for accurate recollection.

Respondent argues the opposite. Respondent notes that Lovelady is employed by the Union and the Union wanted to organize Respondent. Respondent notes that it had refused to voluntarily recognize the Union when initially requested to do so at the Sunnybrook project in March. Thus, Respondent asserts that Lovelady had no motivation for accurate recollection. Respondent also states that Lovelady's testimony was unconvincing. For instance, Respondent notes that it is undisputed that Robertson knew Lovelady was a Union member when Lovelady worked at Sunnybrook in March. Nevertheless, Lovelady testified that when he showed his Union organizer card to Robertson, Robertson told him that he would not have hired him if he had seen that card. Respondent argues that this is implausible. Respondent also notes Lovelady's inability to recall Robertson's statement that there was no way Respondent would go Union even after he read his affidavit.

Analysis

Various aspects of Lovelady's testimony indicate that he was biased. First, I note that he was anxious to testify that Respondent's negligence on the Sunnybrook job was the reason that ODOT terminated Respondent from the job. Whether this is so or not is immaterial to my analysis of the issues in this case. However, Lovelady commented gratuitously on this issue at every opportunity. In my view, this propensity, together with Lovelady's demeanor when providing this testimony, indicates a biased motivation for Lovelady's testimony. Second, Lovelady knew he was present at Cannon Beach to prevent a mudslide onto a public road and wetlands below the construction site. Just as with the Sunnybrook testimony, regarding Cannon Beach, Lovelady was demonstrably anxious to prove that the mudslide danger was Respondent's fault. Yet, apparently knowing there was a mudslide danger, he decided to quit working in the middle of his shift on Thursday, May 16, in order to organize. The timing of this organizational activity indicates hostility toward Respondent. Third, Lovelady testified that Robertson watched him all afternoon on May 16. Lovelady had to recant this exaggerated testimony by admitting that Robertson was helping guide him around a junction box and spruce tree, Robertson was talking on his cell phone, and Robertson was helping others as well.

On the other hand, Robertson's demeanor and the plausibility of his testimony convince me that his recollection of the events was clearer and less biased than Lovelady's. Accordingly, I find that when Lovelady said he was going to take lunch and go organize. Robertson protested that there was a critical situation and he really needed Lovelady to dig. Robertson asked what Lovelady meant by "organize." Lovelady showed Robertson a Union card with his name and title, "Union Organizer." Robertson responded, "Well, what are you going to organize?" I do not find that Robertson told Lovelady that he would not have hired him if he had known he was a Union organizer nor do I find that Robertson told Lovelady that Respondent would lay off Lovelady and put a non-Union person on the job to replace Lovelady because there was "no way Respondent would go Union."

Termination of Lovelady

Later in the afternoon of May 16, Cannon Beach foreman Deardorff asked Robertson what to do with Lovelady because the work he was doing in the X on the south end of the sheer key was near completion. Robertson instructed Deardorff to tell Lovelady to park the hoe in the island and tell him he was laid off and if Respondent needed another hoe operator, it would call him. Robertson also told Deardorff that Lovelady was a Union organizer. Deardorff spoke to Lovelady at quitting time and told him that he was laid off subject to recall, explaining that a senior operator would be in on Monday or Tuesday.

Although Lovelady was not recalled to Cannon Beach or a subsequent project, Moore was not aware that any conscious decision was made about recalling him. The project superintendent and/or project managers make these decisions. Robertson testified that he did not recall Lovelady because Lovelady did not call seeking another job and there were many applicants at the job seeking work. Moreover, according to Robertson, every other Union hand he had hired was "run off the job" by the Union. Both Wolford and McCleary told Robertson that they were told they would be fined by the Union unless they joined a picket of the job or accepted other employment. Wolford relayed to Robertson that Lovelady and Anderson invited him to dinner to convey this to him. With this in mind, Robertson thought that Lovelady would call him if he wanted work. This was consistent with Lovelady's attempts at Albany and, in Robertson's view, was consistent with the Union's rules too.

In addition, the specific work which Moore wanted Spears to perform at Cannon Beach consisted of a major excavation on the north end of ramp eight. Although excavation on the north end of ramp eight was scheduled to begin before Spears' arrival, Respondent waited until Spears arrived to start the excavation because Moore wanted one of his best excavators to perform the work. Respondent viewed Lovelady as a good operator but viewed Spears as one of the best.

The parties stipulated that Respondent has no written policy regarding senior employees' rights to bump less senior employees from jobs. It is also uncontested that Respondent's practice is to keep its senior employees working as much as possible. Moore testified that he implemented this unwritten policy in deciding to lay off Lovelady as a reduction-in-force in order to make room for senior employee Spears.⁸

⁸ Although Moore indicated that he had quality issues with Lovelady's work, this was not the reason for Lovelady's layoff. Moore indicated that the layoff was motivated entirely by reduction-in-force concerns.

Lovelady testified that he had a commercial drivers license and was Haz-mat certified at the time he worked for Respondent. This information is also reflected on his application with Respondent. He testified that he operated a Caterpillar 350 for Respondent at the Sunnybrook job. He has operated bulldozers for 10 to 12 years. Although he can run a finish blade, he did not consider himself a finish blade hand. There is no evidence that Respondent was aware of the bulldozer or finish blade abilities.

Although Lovelady has not been recalled to any further projects for Respondent, Moore acknowledged that there has been “intermittent work that Larry Lovelady could have conceivably been called back in to do [in order] to supplement our own folks core group.” Respondent’s crew daily time sheets for the Vilas Road project for the week of May 13 indicate that Spears worked 52 hours. The crew daily time sheets for the week of May 20 indicate that Spears did not work at the Vilas Road project that week. Other operators remained at the Vilas Road project during the week of May 20. The number of operator hours at Vilas Road decreased from 209 the week of May 13 to 98 the week of May 20. Of nine employees performing operator work during the week of May 13, only two remained on May 24. It is undisputed that Vilas Road was completed in late May or early June.

Respondent’s crew daily time sheets for the Cannon Beach project for the week of May 13 indicate that Lovelady worked as an excavator operator on Monday, Wednesday and Thursday, May 13, 15 and 16, for a total of 28.5 hours on phases 36-F and 35-A. No one worked on Tuesday, May 14, due to rain. Two other operators, Steve Wolford and Fritz Peterson, also worked during the same time on phases 35-A, 37-G and 36-F of the Cannon Beach operation. During the following week, Peterson and Wolford continued operator work on phases 36-F and 37-C, -F and -G of the operation while Spears worked 50 hours during the week on phase 35-A of the operation. Spears continued working on this phase until Wednesday, May 29. On Thursday, May 30, he began working on the same phases as Peterson and Wolford.

Another operator, Willard Teel, also appears on the Cannon Beach crew daily time sheet beginning Tuesday, May 28. Prior to that time, he appeared on the Vilas Road daily time sheets. He worked the same phases of operation as that performed by Peterson and Wolford. Wolford, Peterson and Teel appear regularly on the Cannon Beach crew daily time sheet into June. However, the last entry for Spears is for 3 hours on June 3. The last hours for Teel appear on June 12, and for Peterson, on June 13, Wolford continued to perform operator work on the Cannon Beach project until June 20. Peterson and Teel rejoined the crew on June 24. Spears rejoined the crew on June 27. It is uncontested that Moore temporarily transferred Spears to a Bureau of Land Management (BLM) job in June.

Respondent’s records reflect that after Lovelady’s layoff, other individuals performed work as equipment operators at Cannon Beach. The table below summarizes this data as of the date of this trial. Names appearing in italics were hired prior to Lovelady’s layoff. Names appearing in regular print were hired after the date of Lovelady’s layoff.

	Name	Dates of work⁹	Amount of operator hours	Percentage operator hours to total hours
	Clay, Rocky	05/20 to 10/25	93	11.5
5	DeCambra, Ivorick	07/29 to 10/07	410.5	92
	Hubbert, Vern	05/20 to 09/09	69.5	14.6
	Johnson, Brian	07/01 to 10/28	532.5	65
	Latham, Linda	08/06 to 10/28	278	49
	<i>Peterson, Frederick</i>	05/06 to 10/28	1034.5	97
10	<i>Spears, Jeff</i>	05/20 to 06/03	83	100
	<i>Teel, Willard</i>	05/06 to 10/28	550.5	53
	<i>Vercher, Donnie</i>	05/06 to 10/21	114.5	18
	<i>Virtue, Warren</i>	05/06 to 10/28	904	81
	Webber, Louis	06/24 to 10/28	746.5	84
15	Wilcoxon, Darren	07/15 to 09/10	324.5	89.5
	<i>Wolford, Steve</i>	05/13 to 06/20	155.5	89

Argument

20 The parties acknowledge that the appropriate framework for analysis in determining whether Lovelady was terminated by Respondent in violation of Section 8(a)(1) and (3) of the Act is set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *Transportation Management Corp.*, 462 U.S. 393 (1983). As further explicated in *Manno Electric, Inc.*, 321 NLRB 280, n. 12 (1995), the General Counsel must initially make a showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. See, e.g., *Avondale Industries, Inc.*, 329 NLRB 1064 (1999); T & J Trucking Co., 316 NLRB 771 (1995).

25 There is no real dispute that Respondent knew that Lovelady was a Union organizer and that Lovelady was laid off within hours after Respondent learned of his organizer status. General Counsel argues that Lovelady's protected conduct was the reason he was laid off and not recalled. General Counsel also argues that Respondent failed to prove that it would have taken the same action in the absence of Lovelady's protected conduct.

30 On the other hand, Respondent argues that even if General Counsel satisfied the initial *Wright Line* burden, Respondent proved that it would have laid off Lovelady in any event in order to make room for a senior employee.

35 Although it is not alleged in the complaint, General Counsel also argues that Respondent violated the Act in failure to recall Lovelady and that this failure to recall also illustrates that the termination of Lovelady was unlawfully motivated. Respondent does not address this issue.

45 ⁹ "Dates of work" is not indicative of date of hire or date of termination. It simply indicates the first date work was performed and the last date work was performed at the Cannon Beach project.

Analysis

General Counsel has satisfied the initial *Wright Line* burden. It is uncontested that Robertson was told by Lovelady that Lovelady was a Union organizer only hours before Lovelady was laid off. The timing of the termination supports an inference of animus.¹⁰ Thus General Counsel has shown that Respondent had knowledge of Lovelady's Union support and animus toward that activity. This supports an inference that Lovelady was terminated for his Union activity.

Nevertheless, Respondent has shown by a preponderance of the evidence that it would have taken the same action in any event. Thus, there is no dispute that Lovelady was told that his work might last only for one week. Although Lovelady disputed Respondent's evidence that a mudslide threat existed at the time he was hired, because Lovelady was not present at the Cannon Beach project prior to May 13, he had no knowledge whether the mudslide threat predated his employment on that project or not. Accordingly, I specifically credit Robertson's testimony that a mudslide threat existed at Cannon Beach prior to May 13 and that this was the precipitating factor in hiring Lovelady to work the week of May 13. Further, it is undisputed that Moore and Richardson discussed bringing Spears onto the Cannon Beach project prior to any knowledge regarding Lovelady's organizer status.¹¹ I find that despite any written rule regarding seniority bumping rights, Respondent followed its ordinary practice in transferring Spears to the Cannon Beach project when he was no longer needed on the Vilas Road project. Based on this credible evidence, I find that Lovelady would have been laid off on May 16 regardless of his organizer status.

As to failure to recall Lovelady after he was laid off, I find that the issue is fairly encompassed within the pleadings and was fully litigated by the parties. The record is replete with evidence of employees hired at the Cannon Beach project through the end of October. Each Respondent witness was asked to examine this list and to indicate why the employee was hired and what work the employee performed. Accordingly, this issue will also be considered. See, e.g., *Greenbrier Valley Hospital*, 265 NLRB 1056, 1076 n.14 (1982); *Utilities Corp.*, 254 NLRB 480, 488 (1981).

Having thoroughly examined this evidence, I do not find that Respondent violated Section 8(a)(1) and (3) of the Act by failure to recall Lovelady to the Cannon Beach project. Moreover, although General Counsel argues that Lovelady could have been recalled to another of Respondent's projects, I do not find that this issue was litigated by the parties. There is no evidence regarding the staffing requirements at Respondent's other projects.

The records reflect that various individuals listed as operators either remained on Respondent's Cannon Beach payroll after Lovelady's termination or were added as operators after Lovelady's termination. Only one of these performed in a capacity that Lovelady listed.

¹⁰ See, e.g., *Masland Industries*, 311 NLRB 184 (1993); *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984).

¹¹ It is undisputed that Richardson was aware of Lovelady's status as a Union operator at least at the time of the Sunnybrook project in March. However, the fact that Respondent knowingly hired Union operators does not refute animus toward an individual who announces his status as an organizer. Accordingly, I do not rely on Respondent's hiring of other Union employees to refute animus toward Lovelady's organizer status.

Two individuals, Alan Alexander and Casey Kendall, are listed as equipment operators on Respondent's payroll. They have not been included in the table in the factual section however. That is because, according to Moore, both were hired as pipe foremen and did not perform any operator work. The reason they are listed as operators for payroll purposes is because the foreman pay was \$1 per hour more than the highest paid individual under his supervision, that is, an operator. I credit this explanation and do not find that Alexander's or Kendall's hours are indicative of work that Lovelady might have performed, if recalled from layoff. I note that Robertson, who was present at Cannon Beach each day, also testified that neither Alexander nor Kendall performed operator work.

Turning to the individuals listed in the table in the fact section, Rocky Clay was hired as a concrete laborer and classified as a laborer for payroll purposes. However, he performed operator work on some occasions in order to run the broom or use the backhoe or front loader to move materials. Although Clay did not perform any production operations such as digging, excavating, or loading dump trucks, when he utilized the broom, backhoe, or front loader, he was paid operator wages. Hubbert was hired to work on the storm drain system. He had past experience in installation of cast-in-place inlets. This is considered laborer work. He was hired, like Clay, as a concrete laborer and his operator hours are indicative of time spent incidental to laborer work in moving materials such as inlets, manhole lids, manhole pieces and parts. Neither of these individuals performed work which Lovelady listed.

Johnson, who began work on July 1, was hired as a truck driver. His classification as "operator" for payroll purposes was generally due to operation of a Volvo articulated dump truck. Moore testified that this classification was required by Davis-Bacon because the work was a prevailing wage job. Robertson testified that he hired Johnson for his expertise in logging because there was a lot of clearing and grubbing to be done, because Johnson was also a local resident which meant (per Robertson) that Johnson would be available during the winter months, and because Johnson ran excavators and dozers. Robertson noted that Johnson had extensive experience and owned his own company. These qualifications distinguish Johnson from Lovelady. Although Johnson was hired to operate excavators and dozers, in part, the combination of his other abilities distinguishes his hiring. I find that Respondent did not discriminate against Lovelady by hiring Johnson. Rather, I find that Johnson's hiring was based on a combination of legitimate factors. Moreover, I do not find that Respondent's hiring Johnson instead of recalling Lovelady is indicative of unlawful motivation in terminating Lovelady.

Latham and Vercher were hired pursuant to an ODOT requirement that a certain number of trainees be hired for the project. Respondent's contract with ODOT required that it provide on-the-job training to three individuals, giving them the proper hours to credit their training; that is, 500 hours of operating, 500 hours of laboring, and 500 hours of carpentry as well as hours toward a flagging certificate. Pursuant to this program, Latham and Vercher performed operator work on some occasions, running a steel wheel roller to compact road base material. The hiring of these individuals rather than recalling Lovelady is not evidence of unlawful motivation in terminating Lovelady nor do I find that Lovelady should have been recalled to perform this work.

Virtue was hired by Robertson on March 20, as a laborer. Robertson moved him eventually to the "commercial pit" and at the time of trial, Virtue was the pit foreman. Webber is listed for payroll purposes as a motor grader or finish blade operator. His primary job was that of foreman. He also operated a finish blade for 8 to 10 days. He did not run a track hoe. Wilcoxon was hired July 15 and worked solely as a crane operator. None of these hirings is evidence of unlawful motivation in terminating Lovelady nor does the evidence reflect that Lovelady was qualified for these positions.

Peterson's records reflect that he has worked for Respondent since July 11, 1983. He was transferred to Cannon Beach in April and performed work at Cannon Beach as a bulldozer operator. Spears has worked for Respondent for 22 to 23 years. Teel's records reflect that he has worked for Respondent since May 6.¹² However, Moore testified that Teel has been employed with Respondent for at least the past two years. This is consistent with other records that indicate that Teel worked on the Sunnyside project in March. Teel was brought to the Cannon Beach project to operate the smaller bulldozer and assist with installation of pipe. He did not operate a track hoe. Robertson referred to Teel as a senior employee who was transferred to Cannon Beach for his experience in Volvo operation and his pipe-laying experience. Consistent with Respondent's practice of keeping its senior employees at work as much as possible, I find that no unlawful motivation for Lovelady's termination is shown by the transfer of these individuals to Cannon Beach.

DeCambra's hiring was precipitated by Spears being temporarily transferred to a BLM project by Moore. DeCambra came highly recommended by ODOT and had been visiting the job regularly seeking employment. Robertson hired DeCambra because of this recommendation and also because DeCambra lived in the area. DeCambra operated a high production Caterpillar 350 excavator according to Moore. Lovelady had operated this same equipment for Respondent at the Sunnybrook project. However, Lovelady did not live in the Cannon Beach area, a legitimate criteria for Respondent to consider. Employees like Lovelady, who lived in the Portland area, had to be housed during the rainy winter months. However, sometimes they could only work one or two days during the week due to rain. The economics of one week of housing cost versus inability to work regularly during the winter months is a legitimate concern for Respondent. I find that DeCambra's hiring did not reflect unlawful motivation in termination of Lovelady and his hours do not reflect work that Lovelady would have been recalled to perform.

One other matter bears discussion. Respondent did not specifically determine that it would not recall Lovelady from layoff. In fact, Lovelady is considered an employee in layoff status. Robertson testified that he did not recall Lovelady to Cannon Beach because every other Union hand on the project was run off by the Union. Robertson based this determination on statements made to him by employees Wolford and McCleary. Because Robertson was told by these employees that the Union would not allow them to continue working for Respondent, Robertson assumed the same would be true for Lovelady. I find this explanation credible. I further note that Lovelady affirmatively solicited work at both Sunnybrook and Albany while he was solicited by Respondent for Cannon Beach. Apparently the hiring process can work either way. I credit Robertson's explanation that he had so many individuals seeking employment in person at the Cannon Beach project that he had no need to recall anyone from layoff status.

Threat by telling an applicant that Respondent laid off Lovelady because Lovelady was a Union organizer

James Smith testified that after putting in an application in April, he visited the Cannon Beach job each Monday and spoke with Robertson. On May 13, Robertson assured Smith that the next operator seat would be his. When Smith visited on May 20, he saw a new operator and complained to Robertson that he thought the next job was his. Robertson responded, "Well, I laid this other guy off because he was a union operator, and brought this guy out of Portland."

¹² Many of the payroll records reflect a May 6, 2002, hire date. Apparently this had something to do with generation of the records.

Robertson testified that he was familiar with applicant Jim Smith. Robertson noted that Smith stopped by the Cannon Beach project and submitted his application and stopped in about once a week thereafter to inquire about work opportunities. Robertson denied that he ever spoke with Smith about anyone currently on the job or about anyone laid off from the job. Specifically, Robertson testified that he did not ever tell Smith that he had laid off the track hoe operator because he was a Union organizer. Robertson wanted to hire Smith and at some point during the project, Smith was offered a job. However, he had received a call from the Union hall and was already working on another project.

Although both Robertson and Smith were generally credible witnesses, I credit Robertson's explanation of these events based upon his forthright, detailed explanation and his unbiased assessment of Smith's abilities. Moreover, I specifically credit Robertson's explanation that he did not discuss current employees with applicants.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The complaint is dismissed.

Dated: March 5, 2003

Mary Miller Cracraft
Administrative Law Judge

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.